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Nov 28, 2000 No. 00-836 (18)

In The

Supreme Court of the United States

GEORGE W. BUSH,

Petitioner,

v.

PALM BEACH COUNTY CANVASSING BOARD, *et al.*,

Respondents.

On Writ Of Certiorari
To The Supreme Court Of Florida

BRIEF OF *AMICI CURIAE* THE COMMONWEALTH OF VIRGINIA AND THE STATES OF SOUTH CAROLINA AND NEBRASKA IN SUPPORT OF THE PETITIONER

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INTERESTS OF *AMICI CURIAE*

The Constitution of the United States grants to each State the right to participate – as a State – in electing the President of the United States. Each State holds a number of electoral votes, which will be cast for the candidate favored by its people when the Electoral College meets in December. Each State has a profound interest in ensuring that electors from other States have been chosen according to law. If a slate of electors is seated in violation of the law, their votes will effectively disenfranchise the States whose votes they wrongfully offset.

The unlawful events in Florida that gave rise to this lawsuit are a matter of grave concern to the *Amici*. Although those events have not, so far, altered the slate of electors that will be seated, the matter is not yet concluded. Electors have now been certified; however, new challenges and contests are expected. The disenfranchisement that the *Amici* fear may yet occur. Florida has twenty-five electoral votes. The three *Amici* states – Virginia, South Carolina and Nebraska – collectively have twenty-six. Twenty-five of these votes would be negated wrongfully if the now-certified Florida electors favoring George W. Bush were ousted in favor of a competing slate seated through unlawful means.

This is not, however, an issue confined to the 2000 election, or to States currently in danger of disenfranchisement. Allowing the violations of federal law to go unchecked would invite similar – perhaps competing – misconduct in future elections, possibly disenfranchising other States and surely undermining public confidence in the outcome of the election. In order to preserve their

electoral votes – and the constitutional system of which they form a part – the Commonwealth of Virginia and the States of South Carolina and Nebraska file this brief as *Amici Curiae* in support of the petitioner, George W. Bush.

ARGUMENT

One of the issues before this Court is whether actions by the Florida Supreme Court violate the Due Process Clause and/or 3 U.S.C. § 5. This statute requires a State to resolve controversies relating to the appointment of electors under "laws enacted prior to" Election Day, and fundamental principles of due process allow nothing less. The actions in question include post-election decisions by the Florida Supreme Court that (i) arrogate to themselves the discretion previously vested by law in the Florida Secretary of State with respect to recount deadlines, and (ii) create a later deadline previously unknown in Florida law for local canvassing boards to complete and certify their recount results. The petitioner will show that the Florida court's actions violate applicable federal law. The *Amici* will show that the violation is not harmless, and that the real harm caused is exacerbated by the factual context in which it occurred. The post-election change in Florida law announced by the Supreme Court of that State allows – and was intended to allow – yet another post-election change of law: the counting of "dimpled chads" as votes.

The effect of the Florida Supreme Court's decision was to give three heavily Democratic counties – Broward,

Miami-Dade, and Palm Beach – more time to conduct a manual recount of the ballots cast on November 7. During the recounts in those counties, supporters of the respondent, Albert Gore, Jr., demanded that so-called "dimpled chads" be included in the tally. (In fact, now that the results have been certified, Vice President Gore has filed suit claiming that the failure to count such ballots was unlawful.) *Amici* do not contend that the Constitution or federal law speak directly to the issue of dimpled chads. It is important for the Court to recognize, however, that this issue arose in Florida only because of the state supreme court's decision to extend the deadline for manual recounts. Thus, the violation of 3 U.S.C. § 5 inherent in the court's decision may have prejudiced – and may still prejudice – petitioner Bush because it gave the selected counties the opportunity to explore new ways of counting votes at the behest of his opponent. This is the kind of real-world effect that Congress undoubtedly sought to avoid when it provided, in 3 U.S.C. § 5, that election disputes must be decided according to laws enacted before the election is held.

Background: Punch Card Voting

One of the voting systems often employed in the United States involves the use of punch card ballots. Several Florida counties use the punch card system. Voters are given a card containing a matrix of numbered positions arranged in columns and rows. Each position has been pre-scored to create a small rectangle that is held in place at each of its four corners. This rectangular piece of card stock is known as a "chad." In the voting booth, the voter slides his card into a slot that aligns the

numbered positions with a template bearing the names of the candidates, with a small hole next to each candidate's name. By pressing a stylus through the hole next to the name of a candidate, the voter dislodges the corresponding chad, thereby creating a small hole in the card that will allow light to pass. The ballot is then fed into an electronic counting device that registers a vote for each candidate whose chad has been dislodged. Where the voter has voted for more than one candidate in the same race, the tabulating device will recognize the overvote and count the ballot for neither candidate.

Sometimes, a chad on a punch card ballot is only partially dislodged and remains affixed to the ballot by one, two or three corners. These chads are known as "hanging chads" and are sometimes further differentiated by the number of corners that remain attached: One corner attached – "hanging chad;" two corners attached – "swinging door chad;" and three corners attached – "tri-chad." *What Is a Chad? available at http://www.cnn.com* (last visited Nov. 27, 2000).

What is at issue here are not partially dislodged chads, but chads that are indented or that bulge in some way while remaining attached to the card at all four corners. Such indented – or dimpled[1] – chads may occur when a voter places the stylus in the hole, but decides not to punch through. Dimpled chads may also occur by

[1] According to the nomenclature adopted by the Palm Beach County Canvassing Board, a dimpled chad is "a chad on a voting ballot that is bulging, but not pierced, by a voter's stylus." *What Is a Chad? available at http://www.cnn.com* (last visited Nov. 27, 2000).

rough handling of the ballot or by imprecise manufacturing of the ballot. It can occur if the chad is pressed with a stylus or similar object while the ballot is lying on a hard, flat surface.[2] Given the many ways in which a chad might become dimpled – without the voter intending a vote – the general practice in the United States is not to treat dimpled chads as votes. *See infra* at 10.

There are at least three other reasons why it is inappropriate to treat dimpled chads as votes. First, treating them as votes is likely to wrong two groups of voters: the voters whose ballots have been turned into votes for candidates they did not support, and the voters whose actual votes for the competing candidates have been wrongfully offset.

Second, treating indented chads as votes invites inconsistency. Some voters choose to express their ambivalence by punching out the chads of two or more candidates, thereby canceling out their own vote. If an indentation reflects a voter's intent to punch out a chad, then logically *every* punch card ballot must be reexamined to see whether the vote cast by a *detached* chad has been cancelled out by an *indented* chad found on the same

[2] It is this possibility that has led Respondents to suggest that dimpled chads may be the result of voting in a booth where "the voting machine [has] become[ ] clogged with chads from previous voters." Brief in Opposition of Respondents, at 6, n.2. Notwithstanding this theory, Respondents' brief contains no suggestion that any "clogged machines" were ever reported to poll workers or otherwise discovered in Florida.

ballot and in the same race. There is no indication, however, that recount officials in Florida are taking such a consistent approach to the treatment of indented chads.

Third, every voter has an opportunity to inspect his or her ballot before turning it in to be counted. The law presumes that public officials discharge their responsibilities appropriately. *See, e.g., Gallardo y Seary v. Noble*, 236 U.S. 135 (1915). The law must presume as much about the average citizen exercising his or her responsibilities as a voter. Given the instructions provided to Florida voters, *see infra* at 7, it must be presumed that a citizen who intends to cast a vote for a candidate will not turn in a ballot on which the candidate's chad is merely indented. To treat indented chads as votes turns this presumption upside down by presuming that citizens do not know what they are doing when they come to the polls. Such an anti-democratic presumption ought not to guide our nation's most democratic process.[3]

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[3] Although a few voters may make mistakes, courts have held, for example, that where a "ballot records a 'no-vote' on the tabulating machine for a particular office because of the voter's failure to utilize properly the vote recorded by punching out the 'chad' with the instrument provided, the voter has disenfranchised himself with regard to that office." *Rary v. Guess*, 198 S.E.2d 879, 880 (Ga. Ct. App. 1973). Similarly, the Supreme Court of Indiana upheld a trial court decision to reject a ballot in which the voter "apparently attempted to vote . . . but had not sufficiently punched the card." *Wright v. Indiana*, 428 N.E.2d 1212, 1223 (Ind. 1981).

Florida Law: Before and After the Election

Before November 7, 2000, the three counties where the manual recount has been most at issue – Palm Beach, Miami-Dade and Broward – did not recognize indented chads as votes. Prior adherence to this rule is shown, for example, by the official guidelines administered for a decade by the Palm Beach County Canvassing Board:

> [A] chad that is partially hanging or partially punched may be counted as a vote, since it is possible to punch through the card and still not totally dislodge the chad. *But a chad that is fully attached, bearing only an indentation, should not be counted as a vote*. An indentation may result from a voter placing a stylus in the position, but not punching through. Thus, an indentation is not evidence of intent to cast a valid vote.

Palm Beach County, *Guidelines on Ballots With Chads Not Completely Removed* (adopted Nov. 2, 1990) (emphasis added).

This rule was no secret. The necessity of removing the chad was explained at the polls on election day. Voting instructions provided clear diagrams demonstrating the proper method of punch card voting. The instructions also stated in capitalized and bolded letters:

> **AFTER VOTING, CHECK YOUR BALLOT CARD TO BE SURE YOUR VOTING SELECTIONS ARE CLEARLY AND CLEANLY PUNCHED AND THERE ARE NO CHIPS LEFT HANGING ON THE BACK OF THE CARD.**

App. to Pet. for Cert. at 14a.

In the days immediately following this year's election, the Palm Beach Canvassing Board still followed the established rule on indented chads – the Board did not consider them votes. Then – in the middle of the recount – the Board abandoned the rule. "Nicks, dings and indentations" were then treated – in *some* cases – as votes even though they were "marks that are barely discernable to the human eye." Roberto Suru and George Lardner, Jr., *Gore Gains in Broward, Bush in Palm Beach*, WASHINGTON POST, Nov. 25, 2000, at A1 (quoting Judge Charles W. Burton, head of the Palm Beach Canvassing Board). Standing alone, this change in the rules would be enough to run afoul of due process and 3 U.S.C. § 5. But, to compound the problem, no new written standard was ever adopted for when indentations would be treated as votes. "[B]allot inspectors in Palm Beach County switched standards in the middle of the manual count, a development that produced quite a spectacle." Martin Merzer and Caroline J. Keough, *As Bush Files Suit, Sunday Morning, Recount Shows Gore Gains 36 Votes in Palm Beach County, Bush Loses 3*, MIAMI HERALD, Nov. 13, 2000. Replacing a settled, written rule with this post-election, *ad hoc* approach cannot be squared with the certainty contemplated by both fairness and federal law.

Palm Beach was not alone. Broward County started the recount by not counting indented chads, but began to include them after the recount had progressed about halfway. *See* Don Van Natta, Jr., *Counting the Vote: The Recount*, NEW YORK TIMES, Nov. 20, 2000, at A1. In fact, Broward changed its standards *twice*, once before the Florida Supreme Court decision and, again, after that decision. *See, e.g.*, Mark Silva, *Partisans on Both Sides May*

Not Accept Fla. Supreme Court Decision, MIAMI HERALD, Nov. 20, 2000 ("Broward canvassing board Sunday [Nov. 19] broadened its standards for evaluating ballots. . . . "); Susan Fenechio, *Republicans, Democrats Wrangle Over Broward's Dimples*, MIAMI HERALD, Nov. 24, 2000 ("Canvassing board members said the only rule they were following was the order from the Florida Supreme Court, which on Tuesday [Nov. 21] directed them to determine voter intent on a ballot-by-ballot basis. The court set no guidelines, however.") As in Palm Beach, the indentations considered votes in Broward County were tiny – so tiny as to require one judge to use a magnifying glass to confirm or dispute their presence. *See* John F. Harris, *High Court to Hear Bush Appeal*, WASHINGTON POST, Nov. 25, 2000, at A1 (showing photograph of wide-eyed election judge peering at ballot through magnifying glass).

Miami-Dade County also historically used a "two-corner" standard for counting punch card ballots, but changed the standard to include indented chads during that county's abbreviated hand count. *See* Don Van Natta, Jr., *Counting the Vote: The Ballots; Dimpled Votes Are New Hope for Democrats*, NEW YORK TIMES, Nov. 22, 2000, at A1.

The New Rule Is Contrary to the Weight of Authority

The post-election rule changes in three Florida counties are especially egregious since they place those jurisdictions at odds with the great weight of authority on the handling of punch card ballots. The proper handling of chads was the subject of bipartisan agreement in the U.S. House of Representatives in the 1985 election contest

between Frank McCloskey and Rick McIntyre over a Congressional election in Indiana. While that agreement recognized the need to remove chads in certain circumstances, Congress did not treat chads as votes if they were merely indented:

> It was the Recount Director's recommendation that the auditors be instructed to remove any chad if that chad was hanging by two corners or less. It was the Recount Director's professional opinion that a ballot could be in that condition *only* if the voter unmistakably intended to punch that position. *The Recount Director's recommendation was agreed to by both Majority and Minority.*

Committee on House Administration, U.S. House of Representatives, *Relating to Election of A Representative From The Eighth Congressional District of Indiana*, H.R. Rep. No. 99-58 at 33 (Apr. 29, 1985) (second emphasis added).

In 1989, there was a statewide recount in the Virginia gubernatorial race. Based on official returns, the Democrat, L. Douglas Wilder, appeared to defeat the Republican, J. Marshall Coleman, by a margin of 6,854 out of 1,787,424 votes cast, a margin of less than one half of one percent. Coleman then petitioned for a recount, which Virginia law provides must be conducted under the auspices of a special three-judge court. Va. Code § 24.2-801 (formerly § 24.1-249). It is most instructive that, although the recount procedures were vigorously contested, the counting of indented chads was recognized by all sides as being out of bounds. Instead, invoking the bipartisan precedent of the 1985 McCloskey/McIntyre Congressional contest, Coleman sought to count as votes only

those punch card ballots where two or more corners had been detached. Petitioner's Memorandum Regarding Recount Procedures at 25-26, *Coleman v. Wilder*, Cir. Ct. City of Richmond (No. N 8541-1) (1989). Wilder was unwilling to go even that far, stating:

> A physical recount of the punch card ballots used in this election would be fraught with tabulation errors. The ballots are designed with the specific intent to be read and counted by machine tabulators, and, as a consequence, they are not easily read by the human eye. . . . [T]he counting of votes by such machines is inherently more reliable than a manual count. Displacing the machine generated results with the results of a hand counting of punch cards would be a giant step away from achieving an accurate vote count.

Id. at 25. The recount court resolved the issue by denying any manual recount of punch card ballots, but allowing them to be re-read by re-programmed and re-tested computers. Order Fixing Procedures at 6, 8, *Coleman v. Wilder*, Cir. Ct. City of Richmond (No. N 8541-1) (1989).

A 1994 recount in Ohio also involved the question of how to count "bulging" or "indented" chads. The Ohio Secretary of State resolved that question by deciding that such chads are not to be treated as votes, adopting instead the same bipartisan, "two-corner" rule used in the 1985 Congressional contest. The Secretary of State said:

> I believe that the "two corner" rule provides an objective and equitable standard to determine voter intent and whether a particular vote should be counted. A chad hanging by two or

> less corners indicates that voter's intent to vote in that the voter attempted to push the stylus through the chad and vote for a particular candidate or issue. A chad attached by three or all four corners does not demonstrate the voter's intent to vote. "Bulging" or "indented" chads fall into the later category since the chad is still attached by all four corners.

Letter from Secretary of State Bob Taft to Lorain and Huron County Boards of Elections 6 (Dec. 12, 1994), Secretary Taft then went on to say:

> A bulging or indented chad may result from a voter placing the stylus in the hole opposite the candidate's name and then changing his or her mind. It can also occur if the ballot card is bent or in the handling of the card by the voter or an election official. Therefore it is mere speculation to conclude that a bulging or indented chad indicates voter intent.

Id.

Other States that have dealt with partially dislodged chads have also stopped short of treating dimpled chads as votes. In *Duffy v. Mortenson*, 497 N.W.2d 437 (S.D. 1993), the Supreme Court of South Dakota counted a vote registered by a chad that was not entirely dislodged. The rule used by the court is also consistent with the bipartisan rule followed in the 1985 Congressional contest.

> Two of the four corners of this chad have been broken and one side is separated. The area between the perforations is visibly separated and the chad is indented. Additionally, when this ballot is held up to the light, light clearly

> passes through the separated side of the partially punched chad. Therefore, we presume that this alteration was intended as a vote for Mortenson.

Id. at 440. Such an extensive analysis would have been unnecessary if mere indentation were sufficient to register a vote.

In *Escalante v. City of Hermosa Beach*, 195 Cal. App. 3d 1009 (1987), the California Court of Appeals delivered an opinion that is also at odds with the practice of treating dimpled chads as votes. "When the voter is required to *punch out* the cross that corresponds to his choice and he fails to do so he has failed to mark his ballot as required by law and the vote cannot be counted." *Id.* at 1018-19 (emphasis added) (refusing to count ballots not punched in designated voting squares).

In *Pullen v. Mulligan*, 561 N.E.2d 585 (Ill. 1990), the Supreme Court of Illinois adopted a rule more generous than the 1985 Congressional contest, but one that still stopped short of counting indentations as votes. The court said that requiring a chad to be fully punched out, or to hang on the back of a ballot, would set too rigid a standard because "ballots with only *perforations* on the chad could not be regarded as indicating the voter's intent to vote." *Id.* at 614 (emphasis added). Of course, "perforate" means more than "indent"; it means "to make a *hole* through." Webster's Ninth New Collegiate Dictionary 873 (1991) (emphasis added).[4]

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[4] The court's ruling in *Pullen* was the subject of an affidavit filed in the record below and stating that *Pullen* treated dimpled

Apparently at odds with these cases are Massachusetts cases holding that "a vote should be recorded for a candidate if the chad is not removed but an impression was made on or near it." *Delahunt v. Johnston*, 671 N.E.2d 1241 (Mass. 1996). The precedential value of the *Delahunt* opinion is reduced, however, by several factors not present in the current election. The contest between Delahunt and Johnston was the only one on the ballot and the election was held during a "severe thunderstorm," which indicated that putative voters would not have ventured to the polls motivated by anything less than a strong intent to cast a vote in that race. In light of these circumstances, it was unlikely that a large number of voters would have gone to the polls, partially indented the chad, and then decided not to vote. The court cited "the large number of ballots with discernible impressions" as one of the conditions leading to its decision to count indented chads. *Delahunt*, 671 N.E.2d at 1243. In addition, it was asserted that the ballots had sustained water damage, which rendered their puncture difficult and thus led to undecisive markings. *See* John Mintz, *Most States Don't Count Dimpled Ballots*, WASHINGTON POST,

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chads as votes. Investigation by the Chicago Tribune later revealed that the affidavit was inaccurate. "In fact, in the Illinois case, the dented ballots were not counted at all." Jan Crawford Greenberg and Dan Mihalopoulos, *Bush Turns to Top U.S. Court*, CHICAGO TRIBUNE, Nov. 23, 2000 at 1. When confronted by these facts, the lawyer who signed the affidavit did not contradict the finding, but said that "memories fade" and that he "couldn't remember the details." *Id.*

Nov. 24, 2000, at A1.[5] In any event, Massachusetts' treatment of indented chads is out of step with the rest of the country and cannot absolve the three Florida counties from the unlawfulness of their post-election change in the rules.

Judicial practice among the states is mirrored by legislative practice. Almost universally, state statutes that have addressed the issue of indented chads refuse to treat them as votes. For example, Indiana law expressly says that such ballots do not represent votes: "A chad that has been indented, but not in any way separated from the remainder of the card, *may not be counted* as a vote for a candidate or on a public question." Ind. Code Ann. § 3-12-1-9.5(d) (emphasis added). Michigan law says: "If the electronic voting system requires that the elector cast a vote by punching out a hole in a ballot, the vote shall not be considered valid unless the portion of the ballot designated as a voting position is completely removed or is hanging by 1 or 2 corners or the equivalent." Mich. Comp. Laws § 168.799a.

Some States require election officials to remove chads from ballots when they are "loose" or "partly dislodged" or "hanging by 1 or 2 corners." The purpose of removing chads is to permit the electronic voting equipment to count the vote without interference. By so specifying the circumstances when chads are to be removed, these States imply that chads *not* meeting these criteria – *e.g.* chads

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[5] *But see McCavitt v. Registrars of Voters of Brockton*, 434 N.E.2d 620 (Mass. 1982).

that are merely indented – are *not* to be removed and do *not* indicate votes. For example:

Hawaii: Election official allowed to blow on the punchcard or run fingers along it to find "an incompletely detached chad." Code of Hawaii Rules § 2-53-16(d).

Illinois: "Chad" is defined as "that portion of a ballot card which has been *dislodged or partly dislodged* from the ballot card by a voter when recording a vote" and requiring that such a chad be "removed from ballot cards prior to their processing." Ill. Admin. Code tit. 26, § 207.60 (emphasis added).

Massachusetts: "The inspection team shall also riffle the cards to remove any *loose or hanging* chads." Mass. Regs. Code tit. 950, § 54.07(6)(a) (emphasis added).

Michigan: "When a chad is found *attached to the card by 1 or 2 corners*, the chad shall be removed by the inspector and the ballot card placed with the other ballot cards to be tabulated." Mich. Admin. Code § 168.783(2)(a), emphasis added. Michigan also defines "valid punch" as "a punch of a ballot card such that the chad is completely removed or is *hanging by 1 or 2 corners*." Mich. Admin. Code § 168.771(1)(h) (emphasis added).

Montana: Description of inspection board's duties includes "*hanging* chad – remove chad." Mont. Admin. R. § 44.3.1744(1)(c)(ii) (emphasis added).

Tennessee: Ballot box judge must be "satisfied that all *hanging* chads [cards] are removed" before instructing

voter to place ballot in box. Tenn. Comp. R. & Regs. § 1360-2-7.07(2).

Wyoming: "*Loose chad* still attached to the back of any ballot cards shall be removed." Code of Wyo. Rules 002-040-006 § 17(c)(i) (emphasis added).

While some States have adopted a less rigorous standard, none of the states that have statutorily addressed the issue treat indented chads as votes without something more. For example, a Texas statute provides a specific standard that must be used when determining whether an indentation can be considered evidence of intent. The statute provides, in pertinent part, that a vote on a ballot cannot be counted unless "an indentation on the chad from the stylus or other object is present and indicates *a clearly ascertainable* intent of the voter to vote." Tex. Elec. Code Ann. § 127.130(d)(3) (emphasis added)[6]. By contrast, the counting of dimpled chads in Florida has *no* articulable standard and is reminiscent of Alice-in-Wonderland. "It's not objectively subjective or subjectively objective, but I think it's somewhere in the middle. It's

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[6] Other states' statutes provide some guidance on how to count imperfectly cast punch card ballots, but do not specifically deal with the question of indented chads. Colorado, for example, provides that an improperly marked ballot "shall not be counted . . . if for any reason it is impossible to determine the elector's choice of candidate or vote concerning the ballot issue. A defective or an incomplete mark or punch on any ballot in a proper place shall be counted if no other mark or punch is on the ballot indicating an intention to vote for some other candidate or ballot issue." Colo. Rev. Stat. § 1-7-508(2). The Colorado statutes do not define what constitutes a "defective or incomplete" punch, and the caselaw does not elaborate.

not a whim." Shari Rudavsky, *Board Set To Tackle The Undervotes*, MIAMI HERALD, Nov. 23, 2000, at 5C (quoting Chairman of the Broward County Canvassing Board.) The *Amici* do not contest the right of the Florida legislature to enact a statute – *before* an election – similar to the one adopted by Texas. But, the *Amici* do take issue with (i) the local canvassing boards' post-election rule change on counting indented chads, and (ii) the Florida Supreme Court's post-election abolition of the statutory seven day deadline that allowed and encouraged the free-wheeling counting of indented chads to proceed.

In sum, the great weight of authority condemns the newly minted practice of treating dimpled chads as votes. This practice, while inherently suspect, might nevertheless be lawful if it had been adopted before election day. But, by abandoning the rules in the middle of an election recount, the Florida counties have violated the Due Process Clause of the Fourteenth Amendment as well as 3 U.S.C. § 5. By implicitly sanctioning an abandonment of the rules – and by artificially distorting election deadlines to allow the new, unlawful rules to take effect – the Florida Supreme Court has violated these same principles of federal law. Or, as one commentator recently observed, "A basic understanding of fair play – not to mention respect for the law – presumes that you don't arbitrarily change the rules mid-game, altering deadlines or guessing at voter intent." Kathleen Parker, *Rules Don't Count in Vote Recount*, RICHMOND TIMES DISPATCH, Nov. 22, 2000, at A17.

CONCLUSION

The decision of the Florida Supreme Court should be reversed.

Respectfully submitted,

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